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Nos. 86-735, 86-736, 86-942

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALLEGHENY ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

METROPOLITAN TRANSPORTATION AUTHORITY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

RHODE ISLAND PUBLIC UTILITIES COMMISSION,
NEW JERSEY BOARD OF PUBLIC UTILITIES,
Cross-Petitioners,

v.

METROPOLITAN TRANSPORTATION AUTHORITY,
Respondent.

BRIEF IN OPPOSITION TO PETITIONS AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INTRODUCTION

The New Jersey Preference Boroughs[1], an intervenor-respondent below, submits this Brief in Opposition to Petitions and Cross-Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit by Petitioner Allegheny Electric Cooperative, Petitioner Metropolitan Transportation Authority, and Cross-Petitioners Rhode Island Public Utilities Commission and New Jersey Board of Public Utilities. All three Petitions seek review of various portions of the Second Circuit's decision in *Metropolitan Transportation Authority v. Federal Energy Regulatory Commission,* 796 F.2d 584 (2d Cir. 1986), affirming two opinions issued by the Federal Energy Regulatory Commission, Opinion Nos. 229 and 229-A, 30 FERC(CCH) ¶ 61,323, 32 FERC (CCH) ¶ 61,194. These Opinions interpreted certain provisions of the Niagara Redevelopment Act, 16 U.S.C. §§ 836(b)(1), (2). The common thread running through the Petitions and the Cross-Petition is that the Second Circuit improperly relied upon some or all of the legislative history. The New Jersey Preference Boroughs respectfully suggest to the Court that none of the Petitions or the Cross-Petition present substantive or procedural reasons why this Court should grant the Petitioner's Writs of Certiorari.[2]

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[1] The New Jersey Preference Boroughs consists of the following municipal electric systems in the State of New Jersey: Butler, Lavallette, Madison, Milltown, Park Ridge, Pemberton, South River, Seaside Heights.

[2] For purposes of this Brief, the New Jersey Preference Boroughs adopt the questions presented in each Petition, and the Statement of the Case presented in Allegheny's Petition.

REASONS FOR NOT GRANTING THE WRIT

Allegheny Electric Cooperative, Inc. seeks to have this Court reverse the conclusion of the Second Circuit that the term "neighboring States," 16 U.S.C. § 836(b)(2), should include all states within "reasonable geographic proximity of New York . . . within economic transmission distance." 796 F.2d at 594, at 24a. Allegheny contends that the Second Circuit gave the term a "literal meaning" and consequently failed to fully examine the legislative history which would have resulted in a narrower meaning. Allegheny contends that Pennsylvania and Ohio are the only "neighboring states" entitled to the power made available under section 836(b)(2). The Second Circuit did not "completely ignore" (Petition at 5-6) the legislative history of this term; in fact, the Second Circuit examined the legislative history in detail and reached a conclusion different from Allegheny. 796 F.2d at 594-95, at 24a-26a.

The Metropolitan Transportation Authority seeks to have this Court reverse the conclusion reached by the Federal Energy Regulatory Commission and affirmed by the Second Circuit that "public bodies" under the Niagara Redevelopment Act must be "capable of selling and distributing power directly to consumers of electricity at retail." 796 F.2d at 593, 23a. The MTA does not sell or distribute electricity. Nevertheless, it asserts that a governmental consumer is a "public body" under the Act and therefore, eligible to participate in the allocation of preference power. The MTA contends that the meaning of the term "public bodies" is so clear and unambiguous that it is unnecessary and inappropriate even to look to the legislative history of the Act. This argument, and several

other public policy arguments more appropriately addressed to Congress, were dismissed by the Second Circuit. 796 F.2d at 593-94 n. 8, 23a-24a n. 8.

The Rhode Island Public Utilities Commission and the New Jersey Board of Public Utilities seek to have this Court accept certiorari on the "public bodies" issue presented by the MTA, and to accept a new issue which they call the "state access issue." Reduced to its simplest terms, the Cross-Petitioners are asking the Court to construe the term so as to include a state agency acting as the "bargaining agent" within the class of "public bodies" eligible for preference power even though the state agency has no means of directly selling and distributing power to consumers at retail. Without so stating, the Cross-Petitioners are asking the Court to reverse the Second Circuit's affirmation of the FERC's Opinion that the Vermont Department of Public Service, as constituted prior to 1986, was not a public body "entitled to purchase preference power from PASNY." 796 F.2d at 593 (footnote omitted), 23a.

In support of its position, the Cross-Petitioners complain that the FERC and the Second Circuit should give the term "public bodies" its plain or literal meaning without reference to the legislative history. In support of this proposition the Cross-Petitioners selectively cite portions of this Court's decisions that teach us that statutory construction questions *begin* with the language of the statute itself (Petition at 13-14). Cross-Petitioners conveniently fail to cite to equally relevant cases that state that studying the legislative history is an entirely appropriate and important task in construing a statute. This Court has said:

> When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." *United States v. American Trucking Assns.*, 310 U.S. 534, 543-544 (1940) (footnotes omitted). See *Cass v. United States*, 417 U.S. 72, 77-79 (1974). See generally Murphy, Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 Col.L.Rev. 1299 (1975). *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976).

Ironically, after urging that the Second Circuit erred by relying on the legislative history to construe the term, the Cross-Petitioners then proceed to cite partial legislative histories of several federal preference-type acts and selectively delve into the legislative history of the Niagara Redevelopment Act to support its contention that a state agency that is not a seller and distributor of electricity to consumers at retail should be a Niagara Redevelopment Act "public body."

The Cross-Petitioners also argue that certiorari is appropriate because, "By subordinating its own judgment to the Second Circuit's *PASNY* decision, the FERC abdicated its decisional responsibility and ignored this Court's rulings," (Petition at 21), citing *Chevron U.S.A., Inc. v. National Resource Defense Council, Inc.*, 467 U.S. 837 (1984) and *Chemical Manufacturers Ass'n. v. NRDC*, 470 U.S. 116 (1985). Cross-Petitioners' reliance on these cases is misplaced. The FERC did not read *PASNY v. FERC*,

743 F.2d. 93 (2d Cir. 1984) incorrectly, and *PASNY* certainly did not involve the question of deference to an administrative agency.

In summary, the three Petitions ask this Court for another opportunity to argue their case but all three fail to provide compelling reasons for granting writs of certiorari. None of the Petitions can show a conflict between circuits or between state and federal courts over the Niagara Redevelopment Act; none present convincing arguments that the Second Circuit departed from the accepted course of judicial proceedings or failed to follow the rules for statutory construction; none persuasively argue that a federal question has been construed in conflict with applicable decisions of this Court. In summary, the Petitioners and Cross-Petitioners fail to meet any of the threshold criteria outlined in Rule 17.1 of the Supreme Court Rules.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitions and Cross-Petition for Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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